



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 203 OF 2018

KANTABEN PRABUDAHA NATHA LILA.....PLAINTIFF/APPLICANT

VERSUS

DR. VINOD RAI NATHA LILA GOHIL.....DEFENDANT/ RESPONDENT

RULING

This application is dated 3rd February 2020 and is brought under order 5 Rule 2(1) and (2) of the Civil Procedure Act, Section 3 (A) of the Civil Procedure Act, Section 59 of the Interpretation and General Provisions Act Article 159 of the Constitution of Kenya seeking the following orders;

1. That the summons issued on the 14th September 2018 be Re-issued or extended and the said summons be served upon his Advocates on record.
2. That the costs of this application to be provided for.

It is based on the grounds that after filling the present suit on 12th September 2018 summons were issued on the 14th September 2018 for service upon the Defendant. That there have been numerous trials to personally serve the Defendant herein but will have been unsuccessful. That on 28th November 2018 the Defendant herein dully appointed the Firm of A. B. Patel & Patel act on his behalf in this matter. That despite the defendant herein having appointed the Advocate in this matter he has maintained he has not been served with summons to date. That on 4th April 2019 the Defendant's Advocate informed the Plaintiff's Advocates vide a letter dated 4th April 2019 that the Defendant resides in United Kingdom. That the Plaintiff's Advocate have tried to serve the Defendant personally but the same have proved to be impossible. The plaintiff requires that the suit property be dis encumbered to enable her enjoy the rights under the law. The Defendant stands to suffer no harm or prejudice. Under the circumstances it is only fair and just to grant orders sought

The Defendant/respondent through Patel and Patel Advocates raised a Preliminary Objection to the effect that the Plaintiffs suit herein stands dismissed by operation of the law for being inactive. The Plaintiff instituted the suit over two years ago and has never set the same down for hearing and determination. The suit therefore stands dismissed under the provisions of Order 17 Rule 5 of the Civil Procedure (Amendment) Rules, 2020 and ought to be dismissed with costs to the Defendant.

This court has considered the application, preliminary objection and the submissions therein. The applicant submitted that after filling the present suit on 12th September 2018 summons were issued on the 14th September 2018 for service upon the Defendant. That there have been numerous trials to personally serve the Defendant herein but will have been unsuccessful. That on 28th November 2018 the Defendant herein dully appointed the Firm of A. B. Patel & Patel act on his behalf in this matter. That despite the defendant herein having appointed the Advocate in this matter he has maintained he has not been served with summons to date. The court has taken judicial notice that the firm of Patel and Patel is still on record and is acting on behalf of the defendant in this application.

In the case of **Kenya Commercial Bank Limited vs Ann Kajuju Magondu & Others (2012) eKLR** the court held that the provisions of Order 50 Rule 6 of the Civil Procedure Rules, 2010 empowered the court to enlarge time to extend summons before and after their expiry. Its submission was that the said order provided empowers the court to extend time for doing any act or taking any proceedings outside the time allowed for doing such act or taking proceedings. Order 50 Rule of Civil Procedure Rules provides as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have such power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”

Order 5 Rule 2(1) and (2) of the Civil Procedure Rules that stipulate as follows;

1. A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.

2. Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if it is satisfied that it is just to do so.

It is my view that Order 5 Rule 2 (7) of the Civil Procedure Rules was not stated in mandatory terms and that the court has discretion not to dismiss a suit where no application had been made for extension of validity of summons at the expiry of the date of the original summons. This court referred to the case of **James Muniu Muchere vs National Bank of Kenya (2010) eKLR** the court stated as follows;

“...there is a provision for extension of validity of the original summons to enter appearance, but there is no provision for re-issue. In my considered view, that does not inhibit the court from re-issuing fresh summons to enter appearance. The court has powers under Order IV Rule 3 of the Civil Procedure Rules to issue summons to enter appearance that power extends to re-issue of summons to enter appearance where this is necessary for the ends of justice to be met. Re-issue simply means to issue the summons to enter appearance again.”

In respect of the case of **Mechanised Cargo Systems Limited vs Fina Bank Limited (2007) eKLR**, the court held that it had power to re-issue summons as she was satisfied that there were grounds for not having effected summons upon the Defendant therein. The court stated as follows;

“The application involved the courts inherent jurisdiction together with Order V rule 1(2) of the Civil Procedure Rules. I am satisfied that this court has power to re-issue the summons as sought and having been satisfied by the explanations given why the original summons were not served in time proceed to validate the summons issued in this case by ordering a re-issue and service of summons within 14 days from date herein.”

I find that the plaintiff/applicant has sufficient reasons why the original summons were not served on time. I find that it is curious that the defendant is maintaining an advocate who is on record and insists he has not been served personally. I find this application is merited and I order that the summons be re-issued in this case. Costs of this application be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 8TH DECEMBER 2021.

N.A. MATHEKA

JUDGE